Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

GULF SOUTH MEDICAL AND
SURGICAL INSTITUTE, ET ALS.

versus

AETNA LIFE INSURANCE COMPANY, ET ALS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI BY GULF SOUTH MEDICAL AND SURGICAL INSTITUE, ET ALS. APPELLANTS/RELATORS

Robert Nolan Clarke, Attorney for
GULF SOUTH MEDICAL AND
SURGICAL INSTITUTE, ET ALS.,
APPELLANTS/RELATORS
238½ Metairie Rd. Ste. B
Metairie, La. 70005
Telephone (507) 832-1107
LSBA #4161

61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Have the Honorables, the U.S. Fifth Circuit Court of Appeals permitted the Trial Judge below it to go beyond well-established rules of procedural and substantive law in granting summary judgment upon Appellants action for enforcement of group medical benefits pursuant to ERISA, 29 U.S.C. 1132(a)(1)(B)?

2. May the identity of an anonymous supplier of information to an ERISA administrator or fiduciary be compelled to be revealed where his credentials, the extent and source of information is an issue in a benefits determination? Is a decision made without such revelation reliable per se under the circumstances presented in this matter?

LIST OF PARTIES

1. APPELLANTS/RELATORS:

   Gulf South Medical & Surgical Institute
   Burkes-Farber Clinics
   George Farber, M.D.

2. APPELLEES/RELATEES:

   Aetna Life Insurance Co.
   Medical Review Institute
   LaFarge Corporation

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
TABLE OF CONTENTS AND AUTHORITIES	i-ii
STATEMENT OF JURISDICTION	1
STATEMENT OF STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
ARGUMENT UPON QUESTIONS PRESENTED	2-6
CONCLUSION	6
CERTIFICATE OF SERVICE	
APPENDICES	

AUTHORITIES:

28 USC 1254(1)	1
29 USC 1132(a)(1)(B)	1
Fed. R. Civ. P. 56(c)	1
Fed. R. Civ. P. 59(a)(e)	1,4
Fed. R. Civ. P. 60(b)	1,3
Bachelor v. International Brotherhood of Electrical Workers Local 861, 877 F.2d 441 (5th Cir., 1989)	5
Massachussets Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)	6
McCarty v. Mayo, 827 F.2d 1310 (9th Cir., 1987)	4
Pierre v. Connecticut General Life Ins. Co., 932 F. 2d. 1552 (5th Cir., 1991) cert. den., 112 S.Ct. 453	5

PAGE

Sabbath v. U.S., 88 S.Ct. 1755, 391 U.S. 585, 20 L. Ed. 828 (1968) 4

Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011 (5th Cir., 1992) 3

3 W. Fratcher, Scott on Trusts (4th Ed., 1988) 6

MAY IT PLEASE THE COURT:

I. BASIS OF JURISDICTION:

The supervisory jurisdiction of this Honorable Court over judgments of the United States Courts of Appeal is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

Judgment was rendered and entered in the Honorable United States Court of Appeal For The Fifth Circuit on November 10, 1994; rehearing was denied by it on December 12, 1994 and entered that date.

II. STATUTES INVOLVED HEREIN:

1. 29 U.S.C. 1132(a) (1) (B)
2. Fed. R.Civ.P. 56(c)
3. Fed. R.Civ.P.59(a) (e)
4. Fed. R.Civ.P.60(b)

III. STATEMENT OF THE CASE:

Appellants, GULF SOUTH MEDICAL AND SURGICAL INSTITUTE, ET ALS, provided dermatological services unto Edwin Delaney, Jr., an employee of Appellee, LAFARGE CORPORATION, during 1988 to 1990, and accepted an assignment of insurance benefits under LAFARGE's self-insured benefit plan. Appellee, AETNA LIFE INSURANCE COMPANY, administered the plan and utilized the services of MEDICAL REVIEW INSTITUTE, Appellee, in review of the claims submitted by Appellants, GULF SOUTH, ET ALS. Approximately eighty (80%) per centum of Appellants' claims were denied by AETNA and Appellants, GULF SOUTH, ET ALS., brought suit under 29 U.S.C. 1132(a)(1)(B), the enforcement provisions of ERISA in Louisiana's Twenty-fourth Judicial District Court wherein Appellee, MEDICAL REVIEW INSTITUTE (MRI), obtained its dismissal due to a lack of personal jurisdiction. The remaining Appellees, AETNA and LAFARGE, removed the case to the U.S. District Court, Eastern District of Louisiana and were granted a summary judgment. An appeal as to all Appellees

was taken and the Honorables, the Fifth Circuit Court of Appeals affirmed, finding it unnecessary to reach the jurisdictional question as to MRI. Application for rehearing was denied and review by Writ of Certiorari to this Honorable Court has been sought.

IV. ARGUMENT:

The standard of judicial review, being that of abuse of discretion, has not been challenged. AETNA clearly had power under the LAFARGE plan to decide what were reasonable and customary charges, as well as the medical necessity for the procedures employed. The burden upon your Appellants or Relators is to establish material, substantial evidence of unreasonable actions or misconduct upon the said administrator's part in order to defeat its Motion For Summary Judgment.

While it was certainly permissible for the administrator, AETNA, to have delegated its authority to determine medical necessity to MRI, GULF SOUTH, ET ALS., had absolutely no control whatsoever over what AETNA sent to MRI for review or re-review. Appellants dealt at all times only with AETNA, initially supplying Health Claim Forms and supporting documentation, such as operative and pathology reports, and subsequently by complying with requests for supplemental facts. Moreover, GULF SOUTH, ET ALS., had no communications with MRI save indirectly, as aforesaid. This was confirmed in the deposition taken by Appellants of AETNA's cost containment person, Eileen Kingren. Appendix IV, Exhibit 1, pages 1-6.

MRI issued reports to AETNA, dated November 9, 1988 and March 7, 1989, a portion of the record evidence below, which have been deemed "...a reliable indication of the bases of Aetna's decisions," and upon which Ms. Kingren advised Edwin Delaney, Jr. his benefit claims were denied. Appendix IV, Exhibit 2; I, page 4; IV, Exhibit 1, page 7. Upon Application For Rehearing, Appellant through its counsel supplied the Fifth Circuit Court of Appeals with its exhibit compiled from the

volumes of record evidence, conclusively showing the abovesaid MRI reports to be fallacious in two respects. Either claims were outrightly omitted upon re-review by MRI, or the documentation, which AETNA submitted to the trial court in support of its Motion, did not find its way into MRI's hands. While the indication of the bases of AETNA's determinations may be reliable, the bases themselves are not. Further, although strenuously sought, the identity of the MRI "physician" was strenuously withheld by AETNA's counsel, also representing MRI herein, and MRI has been declared not subject to the jurisdiction of Louisiana courts. Appendix IV, Exhibit 3.

Following the declination of claims, the beneficiary, Edwin Delaney, Jr. made a request for review, resulting in an examination by Robert Rietschel, a dermatologist, convened by AETNA to determine if the skin grafts charged by GULF SOUTH, ET ALS. had been performed. After verification thereof, AETNA 's Eileen Kingren made no modification of the benefits determinations made with MRI's assist, all as abovesaid. Appendix IV, Exhibit 1, pages 9-14; IV; Exhibit 4. In addition, AETNA chose not to follow the suggestions of Dr. Rietschel and the MRI reviewer regarding further review by a board certified dermatopathologist. Appendix IV, Exhibits 4; 2; 1, pages 13, 15. This may be taken as an abuse of discretion standing alone. See Salley v. E.I. DuPont de Nemours & Co., 966 F. 2d 1011 (5th Cir., 1992) at 1015.

Counsel for Appellants, GULF SOUTH, ET ALS., shows that the decision of the Trial Court in these proceedings, granting summary judgment to Appellees, came on April Seventh, 1994 and that he was not received of the depositions taken in this matter until the Eighth day of April, 1994. Appellants immediately moved for reconsideration of the Court's under Rule 60(b), Fed. R.Civ.P., which was denied, the Court noting the lack of the depositions "...is wholly irrelevant; plaintiffs point to nothing in those depositions that support their position." Appendix II,

Exhibits 1, 2 at page 2. A subsequent Motion For New Trial by Rule 59(a)(e) was denied by the Court as Controlled by its ruling on the previous Motion. Appendix II, Exhibit 3. It is respectfully submitted that although the Court below did not specifically address an issue raised in the said Motion For New Trial, the Honorables, the U.S. Fifth Circuit Court of Appeals did, appertaining to the changing of procedure (CPT) or billing codes by AETNA's cost containment personnel. Appendix 1, page 3; IV, Exhibit 1, pages 16-17. AETNA, with MRI's assistance, changed the said codes upon the basis of reports or documentation supplied by Appellants, GULF SOUTH, ET ALS., which in pertinent part was not submitted by AETNA to MRI, or if such was, somehow became lost and reported by MRI to AETNA as undocumented. This fact was established and abstracted to the U.S. Fifth Circuit Court of Appeals as Exhibit A to Appellants' Application For Rehearing, to no avail. Appendix IV, Exhibit 3; III. (All of these said charges were involved in the grafting procedures for which AETNA consulted Dr. Rietschel, as aforesaid.)

Appellants show that despite due diligence, they were unable to present sufficient evidence prior to judgment herein. By the time GULF SOUTH, ET ALS.'s counsel was hand-received of the depositions taken by him, during the final day of a three (3) day trial of another case, summary judgment had already been rendered. From that point on, all of Appellants' pleas for relief were determined under a different standard, the burden having clearly shifted against them. See McCarty v. Mayo,827 F.2d 1310 (9th Cir., 1987). The record of these proceedings is voluminous and consists of numerous statements of medical facts requiring construction and collation by and between scientific opinion and lay testimony, the culmination of which said effort is the alteration of procedure (CPT) codes briefed to and addressed by the Honorables, the U.S. Fifth Circuit Court of Appeals. Its decision upon the issue is reviewable by this Honorable Court. Sabbath v. U.S., 88 S.Ct. 1755, 391 U.S. 585, 20

L.Ed. 828 (1968).

The case of Pierre v. Connecticut General Life Ins. Co., 932 F.2d 1552 (5th Cir., 1991) cert. den., 112 S.Ct. 453 (1991) was cited by both Courts below in regard to reliability of the "material on which the determination was made," or the bases therefor. See, Appendix II, Exhibit 1, page 6; I, page 4. Accordingly, the administrator, AETNA is permitted to utilize hearsay, the MRI reports, in the formulation of its decisions, which, in most if not all instances, were to adopt the determination of MRI as its own. GULF SOUTH, ET ALS. have shown glaring deficiencies in the routing of information between AETNA and MRI, Appellees, which lead to denials of benefits approximating Fifty Thousand and No/100 ($50,000.00) Dollars by the date of MRI's re-review of March 7, 1989, denying claims it had approved in its review of November 9, 1988 by omission and those subsequent to the said review as undocumented. As suggested previously, any attempts to inquire of the anonymous reviewer regarding his informational bases were resisted by Appellees' refusal to disclose his identity.

In Bachelor v. International Brotherhood of Electrical Workers Local 861, 877 F.2d 441 (5th Cir., 1989) at 444, the Court below set out three considerations to guide the inquiry of an abuse of discretion, to-wit:

1. the internal consistency of the plan under the interpretation given by the trustees;
2. any relevant regulations formulated by the appropriate administrative agency; and
3. factual background of the determination and inferences of lack of good faith.

A focus similar to that of Bachelor, Id, is found in trust law:

1. the extent of discretion intended to be conferred upon the trustee of the trust;
2. the existence or nonexistence, the definiteness or indefiniteness,

of an external standard by which the reasonableness of the trustee's conduct can be judged;

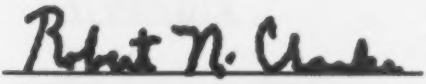
3. the circumstances surrounding the exercise of the power;
4. the motives of the trustee in exercising or refraining from exercising the power;
5. the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

3 W. Fratcher, Scott on Trusts, Section 187 (4th Ed., 1988). Mr. Justice Brennan, in his concurring opinion to Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed. 2d 96 (1985), observed that Congress intended trust law principles to become the enforcement scheme of ERISA and that Courts should provide the remedies needed to protect the rights of the beneficiaries. Id, at 156-57, 105 S.Ct. at 3097-98.

V. CONCLUSION:

Appellants, GULF SOUTH, ET ALS., have presented for this Honorable Court's review their argument, factually based upon the record evidence, establishing an abuse of discretion and a lack of good faith by design, if not intent, on the part of Appellees, AETNA and MRI, employed by LAFARGE to administer and preserve the assets of the group medical benefits plan to which Edwin Delaney, Jr. belonged. It is respectfully submitted that the open and flagrant violation of the rights/ interests of the beneficiary is now patently before this Honorable Court for determination in accordance with the law and principles recited. To sanction such conduct or practices by ERISA fiduciaries under the circumstances shown would be a travesty.

RESPECTFULLY SUBMITTED:



Robert N. Clarke, Attorney for
GULF SOUTH MEDICAL & SURGICAL
INSTITUTE, ET ALS., Appellants/Relators
238 1/2 Metairie Rd. Ste. B
Metairie, La. 70005
Tel.: 504-832-1107 LSBA #4161

I

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30353
Summary Calendar

GULF SOUTH MEDICAL AND SURGICAL INSTITUTE, ET AL.,

Plaintiffs-Appellants,

versus

AETNA LIFE INSURANCE COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA-93-1674-F)

Before POLITZ, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:*

Dr. George Farber, Gulf South Medical and Surgical Institute, and Burks-Farber Clinics appeal entry of summary judgment in favor of Aetna Life Insurance Company in their suit to recover health insurance benefits. Finding no error, we affirm.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

From 1988 to 1990 Dr. Farber treated Edwin Delaney, Jr. for skin disorders, excising multiple lesions and performing skin grafts. Delaney, an employee of Lafarge Corporation, filed for insurance benefits under Lafarge's benefit plan. Aetna, which administered the plan, obtained an evaluation of Delaney's claims from Medical Review Institute and, in concurrence with MRI's recommendation, disallowed approximately 80 percent of the amounts claimed. Obtaining an assignment of Delaney's claims, Dr. Farber, Gulf South Medical, and Burks-Farber Clinics sued Lafarge, Aetna and MRI in state court, invoking the civil enforcement provisions of the Employment Retirement Income Security Act of 1974[1] and also alleging defamation. MRI was dismissed for lack of personal jurisdiction and the remaining defendants removed the action to federal court. The district court granted defendants' motion for summary judgment. This appeal timely followed.

Analysis

We review a grant of summary Judgment de novo, affirming if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[2] Faced with a properly supported action, as here, the nomovant must present sufficient evidence to allow a rational trier of fact to find in his favor.[3]

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[1]29 U.S.C. S 1132 (a) (1) (B).
[2]Fed.R.Civ.P. 56(c).
[3]Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The plaintiffs did not satisfy this burden.

Aetna's decisions to deny coverage rested on factual grounds. To prevail on their ERISA claim the plaintiffs must establish that these decisions by Aetna constituted an abuse of discretion.[4] We find no hint of such in the summary judgment record. The decisionmaking process used by Aetna was rational. It referred Delaney's claims to MRI, a nationally recognized company accredited in numerous states, for evaluation by a doctor certified in dermatology by the National Board of Medical Examiners. Aetna reviewed the evaluation and accepted it, except for instances in which its regional estimate of the reasonable and customary charge exceeded MRI'S.

Nor have the plaintiffs adduced evidence of anything unreasonable in the substance of Aetna's decisions. In no instance did Aetna change Dr. Farber's diagnosis; plaintiffs' contrary protestations misread the MRI evaluations. Although some MRI reports point out that lesions diagnosed as "carcinoma in situ" by Dr. Farber and his pathologist are benign and could be treated more economically by freezing rather than surgery, Aetna did not reduce benefits or otherwise disallow charges on that basis. In several instances Aetna changed procedure codes pursuant to MRI recommendation, but only to conform with Dr. Farber's own reports. Other disallowances were of procedures that were not reflected on Dr. Farber's reports, supplies customarily incorporated in the charge for the surgery, and duplicative surgery charges -- Aetna,

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[4]Pierre v. Connecticut General Life Ins. Co., 932 F.2d 1552 (5th Cir.), cert. denied, 112 S.Ct. 453 (1991).

for example, refused to pay for three full surgeries when three lesions were removed at one time.

Dr. Farber complains that Aetna did not obtain an opinion from a ermatopathologist, as recommended by an MRI reviewing physician and an examining dermatologist, Dr. Robert Rietschel. According to Dr. Rietschel, a dermatopathologist could have established whether "the lesions excised were what they are represented to be." Aetna, however, accepted Dr. Farber's diagnoses. Delaney and Dr. Farber therefore lost nothing by Aetna's failure to consult a dermatopathologist.

Dr. Farber further challenges the district court's reliance on the MRI reports, contending that they are hearsay. The reports provide a reliable indication of the bases of Aetna's decisions and therefore were properly considered in the inquiry whether Aetna abused its discretion.[5] Dr. Farber also contends that Aetna singled out his bills for special scrutiny. In support, he points to a notation on Aetna records of Delaney's claims: "Do not pay any claims to Burks-Farber/Send to C[ost] C[ontainment] U[nit] lst." We conclude that this notation would not support a finding that Aetna failed to exercise impartial judgment.

The appeal of the dismissal of the defamation claim is equally devoid of merit.[6] The plaintiffs contend that Aetna defamed them by communicating its disallowance of charges to Delaney. Clearly such communications are

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[5]Pierre, supra.

[6]We do not decide whether this claim is preempted by ERISA.

qualifiedly privileged. There is no evidence of malice required to overcome this privilege.[7]

The plaintiffs also appeal the dismissal of MRI for lack of personal jurisdiction. The foregoing disposition moots this assignment of error.[8]

AFFIRMED.

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[7]See Rouly v. Enserch Corp., 835 F.2d 1127 (5th Cir. 1988).

[8]MRI's motion to dismiss this portion of the appeal likewise is denied as moot.

II-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GULF SOUTH MEDICAL, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 93-1674
AETNA LIFE INS. CO., ET AL	*	SECTION "F"

ORDER AND REASONS

Before the Court is defendants' motion for summary judgment. For the reasons that follow, the notion is GRANTED.

I. Background

Gulf South Medical and Surgical Institute and Dr. George F. Farber sued Aetna and the Lafarge Corporation to recover medical charges which they claim were wrongly denied. The claims were submitted for dermatological treatment that Mr.Edwin Delaney received from Dr. Farber between August 23, 1988 and June 27, 1990. Plaintiffs have also alleged that the notification by Aetna to Mr. Delaney that their claim was denied for exceeding the reasonable and customary amount charged or for not being medically necessary, was defamatory.

Mr. Delaney was a participant under the Lafarge Employee Benefit Plan. Lafarge had contracted with Aetna to provide claim administration services. As part of its services, Aetna reviewed all medical expenses for the Lafarge Benefit Plan and determined the proper amount of benefits payable.

Aetna and Lafarge assert that plaintiffs cannot establish that the defen-

dant acted in an arbitrary or capricious manner, and therefore, summary judgment is appropriate as a matter of law.

II. Law and Application

A. Summary Judgment Standard

Fed. R. Civ. P. 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken an a whole, could not lead a rational trier of fact to find for the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence in merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted).

In addition, if the party opposing the motion fails to establish an essential element of his case, a judgment is proper. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

B. Scope of Review of Plan Administrator's Determinations

A district court's review of an ERISA plan[1] adminstrator's benefits de-

[1] No one disputes that the Lafarge Plan in one that ERISA covers.

cisions is guided by the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Bruch instructs that:

> [T]he validity of a claim to benefits under an ERISA plan in likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits challenged under Section 1132(a)(1)(b) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Bruch, 109 S.Ct. at 956 (emphasis added).

In this case, Aetna as plan administrator had the discretionary authority to determine all matters of eligibility for the benefits at issue here. Under the "General Exclusions" part, the Plan states that among the services for which coverage will not be provided are: services and supplies "[n]ot necessary, as determined by Aetna, for the diagnosis, care or treatment of the physical or mental condition involved. This applies even if they are prescribed, recommended, or approved by the attending physician or dentist." (Emphasis added). The same part also states that Aetna will not pay for services or supplies "that Aetna determines are not responsible."

Thus Bruch's mandate of de novo review is inapplicable. The Court is limited to reviewing Aetna's benefits decisions for an abuse of discretion. Bruch, 109 S.Ct. at 957. The Court need not address the Fifth Circuit's interpretation of Bruch in Pierre v. Conn. Gen. Life Ins. Co., 932 F.2d 1552,

1562 (5th Cir. 1991), cert denied, 112 S.Ct. 453 (1991) which distinguishes between factual determinations and interpretation of plan terms. This is so because Bruch itself holds that when the plan administrator has discretion to determine the availability of benefits, the decision is subject only to abuse of discretion standard of review. Bruch at 957. Plan terms interpretations are not the issue here.

Plaintiffs, apart from the defamation claims which will be addressed separately in Part D, must therefore establish that Aetna abused its discretion in denying the medical charges that Aetna determined were either not medically necessary or were not a reasonable charge for the services provided.

C. Discussion

Nothing on this record establishes or could persuade a reasonable jury that Aetna, as a matter of law, on the undisputed facts, abused its discretion by denying plaintiffs' claims. Plaintiffs make many conclusory assertions:

> 2. Aetna denied during the relevant time period approximately seventy-five (75%) per cent of the charges submitted by GULF SOUTH, assigning reasons that such charges were not reasonable, medically unnecessary or undocumented.
>
> 4. Although claims to have relied on the recommendations of MRI, in several areas it did not when passing upon the claim; the areas aforesaid were in the realm of dermopathology, a field in which MRI's alleged physician was not quailified/certified. The alleged physician-reviewer requested pathological information or studies, as did a subsequent IME physician, Dr. Robert Rietschel, or at least suggested that such be obtainedwhich was ignored by AETNA in denial of the claims.
>
> 5. By disregarding the advice of Dr. Rietschel and MRI, AETNA

acted unreasonably in dismissing Complainant's claims and the proofs should have been accepted ab initio.

6. The intentional "flagging" of Complainant's claims by AETNA is evidence of abusive conduct which resulted in slow or no payment, loss of income. patients and a diminishment of Complainant's reputation; this activity, together with that above, is compensable as damages due a third-party health care provider.

In contrast to plaintiffs' sweeping conclusory allegations that Aetna abused its discretion, defendants carefully spell out the procedure that Aetna followed in making its determinations. Defendants have provided evidence, in the form of an unanswered affidavit from Diane Hoyle, MRI's executive vice president, that MRI is accredited to review medical claims for necessity and reasonableness of charges in some eighteen states; that MRI uses only board certified physicians; and that the physician who reviewed Mr. Delaney's claims was a board certified dermatologist.[2] It is equally undisputed that MRI used the Health insurance of America database to compare the charges submitted with a developed profile of charges for the same procedure in the relevant geographic area.

Defendants present for the record an unassailable picture of a rational and thoughtful approach to determining which claims should be paid and which ones should be denied. There is no evidence whatsoever in this record that Aetna abused its discretion in the procedure used or in denying the claims

[2] When plaintiffs submitted the claims to Aetna, Aetna referred them for review to the nationally known Medical Review Institute. MRI is a respected national reviewer of medical claims. The evidence on MRI is not challenged.

under that procedure. No alternative is offered by the other side. Dr. Farber obviously disagrees with Aetna's decisions, but the plan entrusts the final decision to Aetna, absent evidence (as opposed to cold arguments) of arbitrary and capricious conduct, and this Court will not substitute Dr. Farber's judgment, nor the Court's, for that of the plan administrator. It is instructive to point out also that plaintiffs present no evidence to suggest that MRI's recommendations were not correct assessments of the reasonableness and medical necessity of the charges and procedures performed on Mr. Delaney.

Plaintiffs rather weakly question MRI's recomendations because its reports were prepared by a doctor who remains anonymous; they argue also that the reports are inadmissible hearsay and thus should not have been relied by Aetna in evaluating plaintiffs' claims.[3] But even if the MRI records are hearsay,which is doubtful, an ERISA benefits determination does not implicate evidentiary matters; the admissibility of hearsay is not the question, it is the administrator's abuse of discretion that matters unless the material on which the determination was made lacks "certain indicia of reliability." Pierre, 932 F.2d at 1562. MRI's strong reputation is clear, as is the evidence that MRI only uses board certified physicians in reviewing claims documents. Plaintiffs point to no evidence to contradict the reliability of the MRI reports.

Plaintiffs also urge that the defendants disregarded the opinion of

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[3] The anonymity of the reviewing dermatologist at MRI, however, can hardly be said, on this record, to resurrect an otherwise factually unsupported opposition to the real material facts that are important to this motion.

MRI and its own IME physician, that Mr. Delaney should be seen by a dermatopathologist. On March 17, 1989, however, the reviewing physician wrote that "an IME by a board certified dermatopathologist appears indicated in this case in order to obtain a second opinion/evaluation of the necessity of care and future treatment in this case." This statement followed the reviewing physician's notation that some twenty-one excisions had been performed that he would have performed instead by freezing (a cheaper procedure). As a result, Aetna then sent Mr. Delaney to Dr. Robert Rietschel, a board certified dermatologist (albeit not a dermatopathologist). Dr. Rietschel wrote that at the time of his examination:

> Mr. Delaney still had actinic keratoses that were present on the fore arms, nose, and right ear. My normal treatment approach to such a patient would be to treat these cryosurgically, that is, to freeze them. It would appear the physicians who have managed his care have preferred to excise each lesion. This individual has clearly had multiple surgical procedures performed, as here are multiple scars about the face and arms at the sites of these prior removals. He has also had dermabrasion over some of the scar areas.
>
> There was a note on the last page of the information provided that indi cated that a prior review of these records was questioned by a board certified dermatoloqist. He had indicated that a review by a dermatopathologist might be worthwhile. Since the pathology reports are not part of the records sent to me, it may be that your company has already embarked upon this, but an independent review of the slides by a dermatopatholoqist might be another way of determining that the le sions excised were what they are represented to be. Some of the more recent reports of suspected squamous cell carcinoma did, in fact, turn out to be actinic keratoses as is present on the examination today.

Clearly, then, following the advice of MRI and Dr. Rietschel could

only have resulted in a denial of more of Mr. Delaney's charges because both doctors recommended following up with a dermatopathologist to verify whether the lesions that were removed by excision—a treatment that they felt should be restricted to malignant growths—were in fact benign actinic keratoses which could have been removed by freezing at a lowercost.

Moreover, the deposition testimony of Mary Hicks and Eileen Kinqen shown that when Aetna's profile of customary fees indicated a higher prevailing rate than the rate recommended by MRI, Aetna paid the higher rate. Aetna rightly argues that plaintiffs can not now object to being paid a higher rate than that suggested by MRI.

Thus, no material facts are in dispute and nothing in this record prevents the Court from holding, as a matter of law, that Aetna did not abuse its discretion in denying plaintiffs' claims.

D. Plaintiffs' Defamation Claim

Summary judgment as to plaintiffs' defamation claim is appropriate because plaintiffs' claim is preemted by ERISA, and because the allegedly defamatory statements are covered by a qualified privilege.

The Fifth Circuit has said that state law claims are preemted by ERISA when they (1) address areas of exclusive federal concern, such as the right to receive benefits under an ERISA plan, and (2) directly affect the relationship among traditional ERISA entities, such as the employer, the plan and its fiduciaries and participants. Memorial Hospital Systems v. North

Brook Life Ins. Co., 904 F.2d 236, 245 (5th Cir. 1990). Plaintiffs' defamation claim plainly meets those criteria and as such is preempted. See Wheelus v. NECA/IBEW Welfare Trust Fund, 788 F.Supp. 1213, 1215 (M.D.Ga. 1992).

The Court also agrees with defendants that even if the plaintiffs' defamation claim is not preempted, it would be covered by a qualified privilege because plaintiffs point to no evidence to refute Aetna's good faith evidence that it believed MRI's recommendations to be well-founded. Rouly v. Research Corp., 935 F.2d 1127, 1130 (5th Cir. 1988). Thus, summary judgment is appropriate as a matter of law as to plaintiffs' defamation claim as well.

Accordingly, defendants' motion for a summary judgment is GRANTED.

New Orleans, Louisiana, April 7, 1994.

Signed By
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

II-2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

GULF SOUTH MEDICAL AND SURGICAL INSTITUTE, ET AL	* CIVIL ACTION
VERSUS	* NO. 93-1674
AETNA LIFE INSURANCE COMPANY, ET AL	* SECTION "F"

ORDER AND REASONS

Before the Court is plaintiffs' motion for reconsideration of the Court's Order and Reasons of April 7, 1994 granting defendant's motion for summary judgment. Plaintiffs also seek leave to file a supplemental memorandum in opposition to defendants' motion for summary judgment. For the reasons that follow, the motion for reconsideration in DENIED, an is plaintiffs' request to submit a supplemental memorandum.

I. Background

On April 7, 1994 the Court granted defendants' motion for a judgment. The Court held: "[N]o material facts are in dispute and nothing in this record prevents the Court from holding, as a matter of law, that Aetna did not abuse its discretion in denying plaintiffs' claims." Order and Reasons, April 7, 1994. The Court also granted summary judgment for defendants on plaintiffs' state law defamation claim because that claim is preempted by ERISA, and the allegedly defamatory statements were covered by a qualified

privilege. Plaintiffs now seek reconsideration of the Court's Order and Reasons, and request leave to file a supplemental memorandum to bolster their opposition to the defendants' already successful motion for summary judgment.

II. Law and Application

Although plaintiffs state that they are seeking "reconsideration, the Federal Rules of Civil Procedure do not provide for such a motion. Plaintiffs' only methods of relief are Rules 59 and 60. Under Rule 59(a) and (e), a trial judge may reopen a judgment based on error of law. Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977). When judicial error results in an erroneous judgment to a party's prejudice, a motion under Rule 59 is appropriate to request that the court the prejudiceresulting from the error by vacating a judgment and granting a new trial. See e.g., Conway v. Chemical Leaman Tank Lines, Inc., 687 F.2d 10 9 (5th Cir. 1982).

Plaintiffs' motion for reconsideration restates arguments which it presented In opposition to the motions for summary judgment that it now seeks to have reconsidered.

Plaintiffs' arguments that the court committed error are wholly unpersuasive. The fact that defendants relied on the depositions of its employees Eileen Kilgren and Mary Hicks that were not available to plaintiffs' counsel is wholly irrelevant; plaintiffs point to nothing in those depositions that support their position.

Plaintiffs contend that at no time did Aetna direct the defendant Lafarge Corporation to pay more than the claims submitted by plaintiffs, contrary to defendants' assertion in their reply brief. This is a non-issue . What Aetna argued was that although it relied on the recommendations of its medical reviewer, MRI, on occasion Aetna decided to pay even more for the

claim than MRI recommended. The defendants did not assert that they paid more than the claim submitted by the plaintiffs. Plaintiffs make much of the fact that both of the consultants utilized by defendants "directed or advised" Aetna to obtain a second opinion from a dermatopathologist, which Aetna never did. This is another non-issue. As the Court held, the recommendation for consultation with a dermatopathologist:

> could only have resulted in a denial of more of Mr. Delaney's charges because both doctors recommended following up with a dermatopathologist to verify whether the lesions that were removed by excision—a treatment that they felt should be restricted to malig nant growths—were in fact benign actinic keratones which could have been removed by freezing at a lower cost.

Order and Reasons, p. 8.

Finally, plaintiffs assert that the deposition of the Executive Vice resident of MRI had been not prior to the Court's ruling on April 11, 1994 and that this deposition would have allowed plaintiffs to discover the identity and credentials of the people who conducted MRI's reviews. Again, the Court has already held that: "The anonymity of the reviewing dermatologist at MRI, however, can hardly be said, on this record, to resurrect an otherwise factually unsupported opposition to the real material facts that are important to this motion." Order and Reasons at p.6, n.3.

Because this Court continues to believe that it was correct in granting summary judgment for Aetna Life Insurance and Lafarge Corporation, it declines to vacate its judgments under either Fed. R. Civ. P. 59 or Rule 60.[1]

Accordingly, plaintiffs' motion for reconsideration is DENIED. Plaintiffs' request for leave to file a supplemental memorandum is also DENIED.

New Orleans, Louisiana, May 5, 1994.

Signed By
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

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[1]Plaintiffs, motion for reconsideration was timely filed under Rule 59. Plaintiff filed for reconsideration on April 11, 1994, and final judgment was not entered until April 15, 1994. See Love v. Dual Drilling Company, 1993 WL 165736 (held that a "10 day period for filing a motion to alter or amend was never triggered" because there "was no Fed. R. Civ. P. 58 or 54(b) judgment" entered subsequent to the court's entry of its order.) Furthermore, because plaintiffs are not entitled to relief under Rule 59, they also are not entitled to relief under Rule 60, which provides for a more limited scope of review than Rule 59. See Silk V. Sandoval, 435 F.2d 1266, 1267-68 (1st Cir. 1971).

MINUTE ENTRY
FELDMAN, J.
MAY 16, 1994

II-3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

GULF SOUTH MEDICAL AND SURGICAL INSTITUTE, ET AL	*	CIVIL ACTION
VERSUS	*	No. 93-1674
AETNA LIFE INSURANCE COMPANY, ET AL	*	SECTION "F"

Plaintiffs have moved the Court for a new trial under Federal Rule 59. This notion, however, follows an earlier motion by plaintiffs for reconsideration of the Court's Order and Reasons granting summary judgment in favor of the defendants. In denying plaintiffs' motion for reconsideration, the Court held:

> Because this Court continues to believe that it was correct in granting summary judgment for Aetna Life insurance and Lafarge Corporation, it declines to vacate its judgments under either Fed. R. Civ. P. 59 or Rule 60.[1]

Order and Reasons, May 6, 1994.

Because this motion is controlled by the Court's May 6, 1994 ruling, IT IS ORDERED:

Plaintiffs' motion for a new trial, scheduled for May 25, 1994, is DENIED.

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[1]Plaintiffs' motion for reconsideration was timely filed under Rule 59. Plaintiff filed for reconsideration on April 11, 1994, and final judgment was not entered until April 15, 1994. See Love v. Dual Drilling Company, 1993 WL 165736 (Judge Clement held that a "10 day period for filing a motion to alter or amend was never triggered" because there "was no Fed. R. Civ. P. 58 or 54 (b) judgment" entered subsequent to the court 's entry of its order.) Furthermore, because plaintiffs are not entitled to relief under Rule 59, they also are not entitled to relief under Rule 60, process provides a more limited scope of review than Rule 59. See Silk v. Sandoval, 435 F.2d 1266, 1267-68 (1st Cir. 1971).

III

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30353

GULF SOUTH MEDICAL AND SURGICAL INSTITUTE, ET AL.,

Plaintiffs-Appellants,

versus

AETNA LIFE INSURANCE COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(December 12, 1994)

Before POLITZ, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is [denied].

ENTERED FOR THE COURT:

Signed by [Henry A. Palitz]
United States Circuit Judge

A. So then I couldn't discuss medical questions with the.

Q. Do you know if you did that in the DeLaney case?

A. I don't believe I did. I don't remember doing that.

Q. Now, with respect to MRI, did you ever have any correspon dence with them orally?In other words, pick up the phone and talk with MRI?

A. I don't remember.

Q. And you don't recall whether or not you talked to any review-ing doctor out in Utah?

A. I never talked to a reviewing doctor, no.

Q. Okay. Now, when you sent the DeLaney claims out to MRI, what was in that package?

A. I don't — I couldn't tell you everything that was in that. I don't remember that.

Q. Well, you would have to send the claim form, right?

A. Well, yes, I would have sent my documentation that I had available to me —

Q. Uh-huh (affirmative response).

A . — that had been submitted to me. I would have sent that along with my request forthe review. And that would have included claim forms, um, operative reports, pathology reports, the clinical notes. Anything that was available would have been sent.

Q . Now, do you recall whether or not with respect to any of the claims that you sent to MRI for review that there were appended to them pathology lab reports?

A. Um, I can't say for sure what was given to them, no.

Q . All right. I'd ask you to please review the document 1A.

A. Okay.

Q . It's just the first couple of paragraphs. will you?

A. Okay.

Q . Tell me when you're finished .

MR. REDFEARN:

Have you read it? Read the first paragraph.

THE WITNESS:

You want me to read the first paragraph?

MR. REDFEARN:

Just read that, and let him ask the question.

THE WITNESS:

All right.

BY MR. CLARKE:

Q. All right. It appears from that document that MRI somehow got their hands on pathology reports.

A. That's correct.

Q. And, of course, they make comment about that. I presume at no time did they have any pathology slides, you know, microscopic slides, of Mr. DeLaney's?

A. You mean actual slides?

Q. Uh-huh (affirmative response).

A. They wouldn't have had those, no.

Q. All right. Now, do you recall whether or not you had any correspondence with either, in writing or orally, the plaintiff Burks-Farber regarding about to supplement their claim forms?

A. Um, I would have requested information that we needed, if that's what

Right.

MR. REDFEARN :

okay.

A. If he requested a review, I would have had the charges re-reviewed.

BY MR. CLARKE:

Q. Okay.

A. Or I would have sent him an explanation. If I needed additional information, I would have told him that we needed that.

Q. Are you saying that's what was done in this case?

A. No. I'm saying that there would have been a response to his note. It wouldn't have went — we would have done something with it, taken some action regarding his request for review.

Q. And so can you recall, other than just your generic response, did you send the man for an IME? What did you do or what was done, if you know? If you don't, say so.

A . I would have to review the records. I don't remember.

MR. REDFEARN:

physician. It would be a matter of what was documented. It's the responsibility of the attending physician to document —

BY MR. CLARKE:

Q. Uh-huh (affirmative response).

A. — if he does and document that accurately. And so what you're talking about is review of records.

Q. Uh-huh (affirmative response).

A. So a doctor can — and we're talking in general. Doctors can say, um, that this is their patient and they are treating them, and they can say several things about this particular patient.

But their records need to back them up, and most doctor's records do back them up because they're very detailed. And so what that doctor, the attending physician, knows about his patient is in that patient 's record so that any other doctor should be able to pick up those records and also know about that patient and what has been done for that patient.

Q. I think that's a good answer, Miss Kingren.

And I think also you've indicated

that everything you had on DeLaney when you determined to seek review by MRI you forwarded everything you had, correct?

A. That's correct.

Q. All right. And you've also indicated that you didn't recall whether or not you had asked Dr. Farber or Mr. DeLaney to supply anything like a pathology lab report from Griffin and Johnson and/or the pathology slides.

So the MRI guy or girl did not have the same when they were reviewing it, right?

MR. REDFEARN:

He's justing ask you do you know whether or not the MRI physicians had the pathology slides .

Is that what you're asking?

MR. CLARKE:

Yeah, you can put it that way.

A. Pathology slide or pathology report?

There's a difference.

BY MR. CLARKE:

Q. Both. And there is, and I'm asking you for both. Johnson and Griffin 's pathology lab report and/or the pathology slide .

A. They wouldn't have any slides. The

She's looking at it.

BY MR. CLARKE:

Q. That's a letter you addressed to Mr. DeLaney telling him he was going to have to eat approximately $50,000 worth of his own bills.

MR. REDFEARN:

I'll object to the form. The letter speaks for itself.

MR. CLARKE:

It does indeed.

BY MR. CLARKE:

Q. You remember that letter, ma'am?

A. I'm reading it.

Q. Okay.

A. Do you have a question on this letter?

Q. Well, first to establish that you wrote it?

A. Yes, I wrote it.

Q. Okay. And then it would be fair to state as of the date of that letter, March 20, '89, the total amount of claims that Aetna had received was as stated 61,000 and some change, correct?

A. Right.

Q. All right. And some months later you went off to another office, but do you know what, if anything, Mr. DeLaney did in response to that?

A. What Mr. DeLaney did?

Q. Uh-huh (affirmative response).

A. Um, there is a note from him that's dated May 18th of '89 --

Q. Right.

A. -- that's requesting review.

Q. Okay. And that was addressed to you?

A. Yes.

Q. So what, if anything, did you do in response to that note?

A. I'd have to review these records that are here. I don't remember.

Q. Please take your time.

MR. REDFEARN:

Eileen, I don't know that he's necessarily — and, Robert, you correct me. I don't know that you are necessarily asking her for a specific piece of correspondence. You are just asking generally what she did in response to that?

MR. CLARKE:

Robert, I do have some records . I don't know if I've got them with me, and I think you've got them, and they may not be in this. But only if this refreshes your recollection, I believe the IME was done in June or July of '89, and I suspect it was connected with this. I don't know if Eileen has a problem — there you go.

She's now looking at — she's going through some more of the correspondence, Robert.

MR. CLARKE:

Uh-huh (affirmative response).

MR. REDFEARN:

Why don't you give her a minute. I suspect this will refresh your recollection . I think you are right. I think the IME was done following that letter .

THE WITNESS:

Well, according to the documents that I have here --

MR. CLARKE:

Yes.

THE WITNESS:

-- for review, it appears that after we got the note from Mr. DeLaney, we received a

letter from Burks-Farber Clinic. And then weset up the IME. We received the letter from Burks-Farber in June. The cover sheet that I'm looking at is dated July 5th, and that was sent to Edwin DeLaney advising him of the IME date.

BY MR. CLARKE:

Q. Okay. Volume Two here, you're referring to the Exhibit No. 3, I presume?

MR. REDFEARN:

You want her to go to the report?

MR. CLARKE:

Yeah.

MR. REDFEARN:

Okay, I've got it. I've got that. I'm showing her — I'm showing her what is an exhibit — Exhibit No. 3, which is the July 17th, 1989, letter or report of Dr. Rietschel, and I presume that's what you want to look at at this point in time.

MR. CLARKE:

Right.

MR. REDFEARN:

She's got it.

MR. CLARKE:

Okay. I don't have the cover sheet

A . What came up was mostly, um, was a multiple procedures and how, um, they could be benefited and what procedures weren't the actual procedures that were done and how those procedures should be benefited.

Q . So you weren't concerned with so much the diagnosis but merely whether or not these procedures were, as you put it, benefitable, correct?

A. We were trying to determine the correct benefits that was payable under that particular contract.

Q . So the diagnosis is insignificant?

A. No, it's not insignificant. It's just that we were not asking this, um, doctor who did the IME to tell us which lesions were cancerous and which were not. That was not a question we presented to him.

Q . And I'm sorry for being as daft as I am, Miss Kingren, but what question was presented to him?

A. What we wanted him to do was to review the — the areas of excision and to see if there was anything that, you know, that would have indicated that we should have maybe allowed

more or additional benefits.

Q. Now

A. Particularly, it would have been the skin grafting that was done.

Q. And --

A. It would have taken someone actually looking at the surgical site to determine the skin grafting was done.

Q. And why was that significant?

A. Because there were several charges for skin grafting.

Q. And that's not benefitable?

A. Yes, it is, but it has to be — it would have to be documented.

Q. Uh-huh (affirmative response).

A. And the doctor 's record that that grafting was done.

Q. Right. Now, that's indicated, upon further inquiry by your office, that skin grafting was done, correct?

A. Okay.

MR. REDFEARN:

I'm showing her Exhibit 4, which I believe is the July 31st letter you're referring to, Robert.

A. Right.

Q. So we can presume that to be the situation. So what did you do then? Did you go back and say, okay, we've got a confirmation that skin grafts were done? I see that we didn't pay for that. Oh, here's a check. Or did you just ignore it?

A. Um, no, we didn't ignore it. When he signed that skin grafts were done, he's not saying specific sites.

Q. Nor is he saying that these might have occurred when Mr. DeLaney wasn't in his prepubescent age of life. Never mind, Miss Kingren.

Next question: What, if anything, did your office supply to Wayne Oakland Medical Center that was sent to Dr. Rietschel; do you know?

A. I don't know what was sent. I don't remember what was sent.

Q. Well, it looks to me if you look at that third paragraph, the first of the IME reports, he's commenting upon the records that were sent to him, and he's stating that there was a note on the last — quote, on the last

A . That's correct.

Q. A lot clearer now. Okay. I'm wondering, you indicated if MRI started screwing up, you wouldn't use them, right?

A. That's correct.

Q . And it seems to me that despite some effort by yourself this IME fellow over there at Ochsner that an outfit out of Michigan found for you all, he never answered the questions you wanted answered; isn't that right?

A. Right .

Q. So I guess you wouldn't use them again?

A. Are you referring to Dr. Rietschel?

Q . Yeah.

A . Right. I may not have. It would depend on the situation.

Q . And because he didn't answer the questions you wanted answered, you were then left with a void of information.

What did you do next?

A. Okay. There wasn't anything to indicate that we should allow any more than what we had already allowed. So I maintained our original determination.

page of the information provided that indicated a prior examination of these records was requested by a board-certified dermatologist.

Now, I presume that that was your physician at MRI?

A. I would assume that.

Q. He goes on to state: He had indicated that a review by a dermatopathologist might be worthwhile. That's a quote.

So at that point, Miss Kingren, we have no one but two physicians, one of whom at this point is anonymous, but presumably exists, two physicians employed by Aetna, both of whom say, hey, fellow, you better have this guy checked out by a dermatopathologist.

Did you ever do it?

A. No, not — there wasn't anything that I'm aware of that was done after the IME that I was involved in.

Q. Let's see. You left October of '89. This letter is July of '89.

A. Right.

Q. So you were still there, and I presume that the mail would have reached you somehow. Louisiana to Troy, Michigan, to Texas.

What you want to look at, the MRI form?

MR. CLARKE:

Any of the 13 MRI forms. Pick them out .

THE WITNESS:

Okay. I have the one here dated 11/9 of '88.

BY MR. CLARKE:

Q . Okay.

A. Now, what exactly is your question, or do you have one on here?

Q . Well, you've indicated that Aetna doesn't change the diagnoses, right? You did state that.

A. Right. We said we didn't change the diagnosis code.

Q . Right. But it sure seems to me that if you look through any of those reports, you would notice, as well as on any EOB that's in dispute in this case, that there are multiple changes of diagnoses.

A. No. These are changes in CPT and CPT codes. And the CPT code that fit the procedure and these codes are set by the code, and the

description of the procedure that goes with that code comes from the American Medical Association.

So if we look at — if we look at an operative report or a pathology report and what was done does not match that CPT code that was used in the billing, then it would be changed to the correct CPT code for the procedures as documented in the record.

Q. Yes, ma'am. I understand what you're saying. I just don't particularly agree with it. And all I was suggesting to you is that although you've indicated that you don't change the diagnosis, physicians that have been employed on Mr. DeLaney's case certainly, shall we say, recharacterized his condition?

For instance, if you look along -- let's see. If you'll pardon me, this case involves quite a bit of juggling of paper and some comprehension.

All right. Here we go. We're looking, Robert, and, Miss Kingren, at Exhibit B.

MR. REDFEARN:

B?

IV EXHIBIT #2

MEDICAL REVIEW INSTITUTE

of America

11/9/88

Eileen Kingren
Aetna Life Insurance
Tyler, TX

Employee: Edward Delaney
Claimant: Same
Policy: 43530 3201

I have carefully reviewed the enclosed document changes of $13,000 from 8/23 to 8/31/88 were billed. These costs appear above U&C.

On 8/23/88, the lesion excised from the neck was billed as a malignant lesion. However the pathology report showed "squamous cell CA in situ", which is a solar keratosis.

On 8/29 and 8/31/88, the number of pathology reports do not correlate with the number of lesions listed on the claim forms. The listed sizes of the lesions and the sizes of the closures seem unusual.

On 8/24, 8/27, 8/29, and 8/31, charges of $45 for photochemo-therapy. (CPT #96910) are listed but no mention is made in the operative reports to indicate this service was performed.

On 8/23, 8/24, 8/29 and 8/31. the fees for the surgical excision and for multiple histological pathologies were not reduced for multiple procedures on the same day.

Based on the information given, appropriate codes and R&C would be as follows:

			REVISED CODE
8/23/88	#85022	Lab	OK as billed
	#80019	Lab	OK as billed
	#90050	Office visit	OK as billed
	#14300	Removal malignant lesion to 2.0 cm	R&C = $400.00 #11642
	#14041	Squamous CA in situ, ear This is really a solar keratosis	R&C = $ 50.00 #17000

(Continued)

REVISED CODE			
	#11643	Squamous CA in situ, neck This is a solar keratosis	#17001 = $35.00
	#88304 X 3	Histo-pathology X 3 reduction for multiple pathology	#88305 (once) $55.00
	#99070	Surgical dressing	OK as billed
	#99070	Supplies	OK as billed
	#99070	Surgical tray	OK as billed
	#90788	Lincocin	No charge Not documented
	#90782	Celestone	OK as billed N/C - not documented
	#96999	O.R. technician	OK as billed
	#85651	Sedimentation rate	OK as billed

8/24/88	#90050	Office visit	OK as billed
	#14041	Graft, forehead	OK = $875.00
	#11642	M/L (L) epicanthal	OK = $400.00
	#88304 X 3	Histo-pathology Multiple specimen	#88305 (once) $ 55.00
	#96910	Photochemotherapy not documented	Code OK - N/C
	#90788	Lincocin not documented	Code OK - N/C
	#90782	Hexadrol not documented	Code OK - N/C
	#90799	Carbocaine	Code OK - as billed
8/27/88	#90050	Office visit	Code OK - as billed
	#96910	Photochemotherapy Not documented	Code OK - N/C
	#90788	Lincocin Not documented	Code OK - N/C
	#90782	Hexadrol not documented	Code OK - N/C

(Continued)

			REVISED CODE
8/29/88	#90050	Office visit	Code OK - R&C as billed.
	#14061	Graft, ears	$1025.00
	#11642	2.6 Basal cell CA, ear	Code OK $400.00

	#11642	1.6 Basal Cell CA, ear 50% of $400	#11642-51 R&C - $200.00
	#88304 X 4	Histo-pathology X 4 R&C $ 55.00	#88305 (once)=
	#96910	Photochemotherapy	Code OK N/C not documented
	#99070	Surgical tray	Code OK R&C as billed
	#99070	Supplies	Code OK R&C as billed
	#99070	Dressing	Code OK R&C as billed
	#90788	Lincocin	Code OK N/C - not documented
	#90782	Hexadrol	Code OK - N/C - Not documented
	#96999	O.R. Technician	Code OK - R&C as billed
8/31/88	#90050	Office Call	Code OK - R&C as billed
	#90292	Surgical center visit Surgical center discharge	Code OK - N/C - is not documented
	#14061	Nose graft	Code OK - R&C $1025.00
	#11642	Basal Cell CA. nose 2.7 cm.	Code OK - R&C = $400.00

	#11642	Basal Cell CA, nose 50% of $400, (I.3 cm)	#11642-51 R&C = $200.00

(Continued)

8/31/88 (continued)

	#11416	Basal cell CA, nose - 1.2 cm - 50% of $400 =	#11642-51 $200.00
	#11641	1.6 cm. Basal Cell Ca. nose -	#11641-51 R&C - $200.00
	#88304 X 5	Histo-pathology Multiple specimens	#88305 (once) R&C = $ 85-00
	#96910	Photochemotherapy No documentation.	Code OK N/C
8/24/88	#11642	Sideburn area 50% of $400 =	#11642-51 $200.00
8/29/88	#11642	1.2 Basal cell CA. ear 50% of $400	#11642-51 $200.00

The physician providing this review is certified by the National Board of Medical Examiners and is a Diplomate, American Board of Dermatology and Pathology. He has conducted a number of research studies and is an associate professor of Medicine at a college of medicine. He is a Fellow of the American Academy of Dermatology and is a member of the AMA, his local and state Medical Associations and the American Federation for Clinical Research. He has been in practice for approximately ten years.

This opinion is based solely upon records submitted by the client for review; no independent investigation has been undertaken. The decision for benefits rests with the insurance carrier. Reconsideration may be warranted upon receipt of additional records.

/jiw

March 7, 1989

Eileen Kingren
Aetna Life Insurance Co.
Tyler, TX

Employee: Edward Delaney
Claimant: Same
Policy: 435303201

The attached claim was re-reviewed with additional information and photos provided at this time. Further review was requested with regard to follow-up treatment.

Based on the submitted records, the following would be R&C for that area:

8/23/88:		
90050	Office call (OK as billed)	$ 33.00
13131	Excision, malignant lesion Basal cell carcinoma, lip (billed as 14300)	$ 650.00
11100	Excision, malignant lesion carcinoma, ear (billed as 14041)	$ 70.00 (1)
11101 -52	Excision, malignant lesion carcinoma, neck (billed as 11643)	$ 35.00 (1)
88305	Histopathology (multiple specimen) (billed as 88304)	$ 85.00
99070	Dressing (not U&C to charge for this)	$—0—

99070	Supplies (not U&C to charge for this)	$—0—
99070	Sterile tray (OK as billed)	$ 65.00

(Continued)

90788	Lincocin (not U&C to charge for this)	$—0—
90782	Calestone (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—
85651	Sed Rate (OK as billed)	$ 11.00
85022	CBC/differential (OK as billed)	$ 15.00
80019	Multichemistry (OK as billed)	$ 26.00

8/24/88:

99070	Sterile tray (OK as billed)	$ 65.00
99070	Dressing (not U&C to charge for this)	$—0—
99070	Supplies (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—

8/27/88		
90050	Office call (OK as billed)	$ 33.00
96910	Photochemothorapy (no documentation this was done)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Hexadrol (not U&C to charge for this)	$—0—

(Continued)

8/29/88		
90050	office call (OK as billed)	$ 33.00
11642 -22	Graft, carcinoma, left ear billed as 14061, 11642 (x3)]	$ 600.00 (2)
88305	Histopathology Multispecimen (billed as 88304 x4)	$ 85.00
96910	Photochemotherapy (no indication given in these records and no documentation it was done)	$—0—
99070	Sterile tray (OK as billed)	$ 45.00
99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressing (not U&C to charge for this)	$—0—

90788	Lincocin (no indication for this)	$—0—
90782	Hexadrol (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—
8/31/88		
90050	Office call (OK as billed)	$ 33.00
90200	Visit (S.S.C.) (not U&C to charge for this)	$—0—
90292	Discharge (not U&C to charge for this)	$—0—
14061	Basal cell carcinoma, face, graft	$—0—

Based on the submitted operative report, no graft was done. Rather, it appears flaps were used.

(Continued)

Page 4.
E. Delaney

11642	Excision, malignant lesion, basal cell carcinoma, face	$ 300.00
11642 -52	Excision, malignant lesion, basal call carcinoma, face	$ 200.00
11642 -51	Excision, malignant lesion, basal call carcinoma, face	$ 150.00
11641 52	Excision, malignant lesion, basal cell carcinoma, face	$ 75.00
88305	Histopathology	$85.00

	Multispecimen (billed as 88304 x 5)	
96910	Photochemotherapy (not U&C)	$—0—
9/7/98:		
90050	Office call (OK as billed)	$ 33.00
14300	Graft (no documentation that grafts were done)	$—0—
14041	Graft, forehead (no documentation that grafts were done)	$—0—
11642	Excision, malignant lesion	$ 300.00
11642 -52	Excision, malignant lesion	$ 200.00
88305	Histopathology (x4) multispecimen (billed as 88304 x 4)	$ 85.00
96910	Photochemotherapy (indication not documented)	$—0—
99070	Sterile tray (OK as billed)	$ 65.00
99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressing (not U&C to charge for this)	$—0—

(Continued)

96999	O.R. technician (not U&C to charge for this)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Hexadrol (not U&C to charge for this)	$—0—
9/12/88		
90050	Office call (OK as billed)	$ 33.00
14300	Graft, basal call carcinoma, ear (not documented as done)	$—0 —
14041	Graft, basal call carcinoma, face (not documented as done)	$—0 —
11623	Excision, malignant lesion, basal call carcinoma, neck	$ 350.00
11623 -52	Excision, malignant lesion, basal call carcinoma, neck	$ 275.00
88305	Histopathology (x4) Multispecimen (billed as 88304 X4)	$ 85.00
96910	Photochemotherapy (not U&C)	$—0—
99070	Sterile tray (OK as billed)	$ 65.00
99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressinq (not U&C to charge for this)	$—0—
96999	O.R. technician	$—0—

	(not U&C to charge for this)	
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Calestone (not U&C to charge for this)	$—0—

(Continued)

90050	Office call (OK as billed)	$ 33.00
11100	Graft (billed as 14300)	$ 70.00
11101	Excision, malignant lesion*	$ 60-00 (1)
11101	Excision, malignant lesion*	$ 35.00 (1)
11101	Excision, malignant lesion*	$ 35.00 (1)

*This was billed as 11643, 11642, 11642.

88305	Histopathology (X4) (billed as 88304 x4)	$ 85.00
90799	Carbocaine (not U&C to charge for anesth.)	$—0—
96910	O.R. technician (not U&C to charge for this)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Hexadrol	$—0—

<u>9/17/88:</u>

90050	Office call (OK as billed)	$ 33.00

All other charge this date do not appear justified, as no documentation for the other services billed is provided.

9/19/80:		
90050	Office call (OK as billed)	$ 33.00
11100	Excision, malignant lesion (billed as 11643)	$ 70.00 (1)
11101	Excision, malignant lesion (billed as 11643)	$ 35.00 (1)
11101	Excision, malignant lesion (billed as 11642)	$ 35.00 (1)
88305	Histopathology (x3) Multispecimen (billed as 88304 x 3)	$ 85.00

(Continued)

16035	Escharotomy (not U&C)	$ —0—
96910	Photochemotherapy (not U&C)	$ —0—
90799	Carbocaine (not U&C to charge for anesth.)	$ —0—
90788	Lincocin (not U&C to charge for this)	$ —0—
90782	Hexadrol (not U&C to charge for this)	$ —0—
9/21/88:		
90050	Office call (OK as billed)	$ 33.00

All other charge this date to not appear justified, as no documentation of these services is provided.

9/26/88:		
90050	Office call (OK as billed)	$ 33.00
14300	Graft (not documented as done)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Calestone (not U&C to charge for this)	$—0—
90799	Carbocaine (not U&C to charge for this)	$—0—
11643	Excision, malignant lesion	$ 300.00
11643 -52	Excision, malignant lesion	$ 200.00
88305	Histopathology (x3) Multispecimen (billed as 88304 x 3)	$ 85.00
96910	Photochemotherapy (not U&C)	$—0—

(Continued)

9/28/88:		
90050	Office call (OK as billed)	$ 33.00
11642	Excision, malignant lesion	$ 300.00
88304	Histopathology	$ 45.00
96910	Photochemotherapy (not U&C)	$—0—
99070	Sterile tray (OK as billed)	$ 65.00

99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressings (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Hexadrol (not U&C to charge for this)	$—0—
90799	Carbocaine (not U&C to charge for this)	$—0—
<u>10/3/88:</u>		
90050	Office call (OK as billed)	$ 33.00
11100	Graft (billed as 14061)	$ 70.00 (1)
11101	Graft (billed as 14061)	$ 35.00 (1)
88305	Histopatholoqy (x2) (billed as 88304 x2)	$ 85.00
96910	Photochemotherapy (not U&C)	$—0—
90799	Carbocaine (not U&C to charge for anesth.)	$—0—

(Continued)

90788	Lincocin (not U&C to charge for this)	$—0—
90782	Hexadrol	$—0—

	(not U&C to charge for this)	
10/5/88:		
90050	Office call (OK as billed)	$ 33.00
16035	Escharotomy (not U&C)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Calestones (not U&C to charge for this)	$—0—
88305	Histopathology (x5) Multispecimen (billed as 88304 x5)	$ 85.00
96910	Photochemotherapy (not U&C)	$—0—
11642	Excision, malignant lesion	$ 300.00
11100	Excision, actinic keratosis (billed as 11642-51 at $410)	$ 70.00
99070	Sterile tray (OK as billed)	$ 65.00
99070	Dressing (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—
99070	Supplies (not U&C to charge for this)	$—0—
14300	Graft (no documentation that graftswere done)	$—0—

(Continued)

14060	Graft (no documentation that grafts were done)	$—0—
11642	Graft (no documentation that grafts were done)	$—0—
10/8/88:		
90050	Office call (OK as billed)	$ 33.00
11100	Excision, malignant lesion (billed as 11624 A)	$ 70.00 (1)
11101	Excision, malignant lesion (billed as 11623 B)	$ 35.00 (1)
11101	Excision, malignant lesion (billed as 11622 C)	$ 35.00 (1)
11101	Excision, malignant lesion (billed as 11603 D)	$ 35.00 (1)
11101	Excision, malignant lesion (billed as 11602 E)	$ 35.00 (1)
88305	Histopathology (x5) (billed as 88304 x5)	$ 85.00
96910	Photochemotherapy (not U&C)	$—0—
99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressing (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—

90799	Carbocaine (not U&C to charge for anesth.)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Hexadrol (not U&C to charge for this)	$—0—

(Continued)

Page 11
E. Delaney

10/10/88:

0050	Office call (OK as billed)	$33.00
11100	Graft (billed as 14041)	$ 70.00 (1)
11101	Graft (billed as 14040)	$ 35.00 (1)
11642	Excision, malignant lesion	$ 300.00
11642 -52	Excision, malignant lesion	$ 200.00
11101	Excision, malignant lesion (billed as 11642)	$ 35.00 (1)
88305	Histopathology (x5) Multispecimen (billed as 88304 x5)	$ 85.00
99070	Sterile tray (OK as billed)	$ 65.00
99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressing	$—0—

	(not U&C to charge for this)	
96999	O.R. technician (not U&C to charge for this)	$—0—
96910	Photochemotherapy (not U&C)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Celestone (not U&C to charge for this)	$—0—
<u>10/12/88:</u>		
90050	Office call (OK as billed)	$ 33.00
11100	Excision, malignant lesion (billed as 11603)	$ 70.00 (1)

(Continued)

11101	Excision, malignant lesion (billed as 11602)	$ 35.00 (1)
11101	Excision, malignant lesion (billed as 11602)	$ 35.00 (1)
88305	Histopathology Multispecimen	$ 85.00
99070	Sterile tray (OK as billed)	$ 45.00
99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressing (not U&C to charge for this)	$—0—

96999	O.R. technician (not U&C to charge for this)	$—0—
96910	Photochemotherapy (not U&C)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90788	Hexadrol (not U&C to charge for this)	$—0—

10/17/88:

90050	Office call (OK as billed)	$ 33.00

All other charges on this date do not appear warranted, as there is no documentation provided regarding the services billed.

10/19/94:

11643	Excision, malignant lesion	$ 300.00
11643 -52	Excision, malignant lesion	$ 200.00
11643 -52	Excision, malignant lesion	$ 150.00
11100	Excision, malignant lesion (billed as 11642)	$ 70.00 (1)

(Continued)

11101	Excision, malignant lesion (billed as 11642)	$ 35.00 (1)
15781	Abrasion (not U&C)	$—0—
88305	Histopathology (x5) multispecimen	$ 85.00

(billed as 88304 x5)

90788 Lincocin $—0—
(not U&C to charge for this)

90782 Depomedrol $—0—
(not U&C to charge for this)

99070 Sterile tray $ 45.00
(OK as billed)

99070 Supplies $—0—
(not U&C to charge for this)

99070 Dressing $—0—
(not U&C to charge for this)

96999 O.R. technician $—0—
(not U&C to charge for this)

10/22/88:
90050 Office call $ 33.00
(OK as billed)

All other charge this date do not appear justified, as no documentation is provided regarding the services billed.

10/24/88:
90050 Office call $ 33.00
(OK as billed)

11642 Excision, malignant lesion $ 300.00
(billed as 14300*)

*No graft on this date is documented in the submitted records.

11642 Excision, malignant lesion $ 200.00
-52

(Continued)

11642 -51	Excision, malignant lesion	$ 150.00
88305	Histopathology (x3) Multispecimen (billed as 88304 x3)	$ 85.00
99070	Sterile tray (OK as billed)	$ 65.00
99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressing (not U&C to charge for this)	$—0—
96999	O.R. technician (not U&C to charge for this)	$—0—
96910	Photochemotherapy (not U&C)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Depomedrol (not U&C to charge for this)	$—0—
10/26/88:		
11633	Excision, malignant lesion	$ 250.00
90050	Office call (OK as billed)	$ 33.00
11643 -51	Excision, malignant lesion	$ 300.00
11100	Excision, malignant lesion (billed as 11642)	$ 70.00 (1)
11101	Excision, malignant lesion (billed as 11642)	$ 35.00 (1)
88305	Histopathology (x3) Multispecimen	$ 85.00

	(billed as 88304 x3)	
99070	Sterile tray (OK as billed)	$ 45.00

(Continued)

99070	Supplies (not U&C to charge for this)	$—0—
99070	Dressing (not U&C to charge for this)	$—0—
88304	Histopathology (x3) (included in 88305 above)	$—0—
11101	Excision, malignant lesion (billed as 11642)	$ 35.00 (1)
11101	Excision, Malignant lesion (billed as 11642)	$ 35.00 (1)
96999	O.R. technician (not U&C to charge for this)	$—0—
96910	Photochemotherapy (not U&C)	$—0—
90788	Lincocin (not U&C to charge for this)	$—0—
90782	Depomedrol (not U&C to charge for this)	$—0—
<u>10/31/88:</u>		
90050	Office call (OK as billed)	$ 33.00
14300	Graft (no documentation that this was done)	$—0—

99070 Supplies $ 45.00
(OK as billed)

99070 Dressing $—0—
(not U&C to charge for this)

96999 O.R. technician $—0—
(not U&C to charge for this)

96910 Photochemotherapy $—0—
(not U&C)

90788 Lincocin $—0—
(not U&C to charge for this)

90782 Hexadrol $—0—
(not U&C to charge for this)

(Continued)

11622 Excision, malignant lesion $ 300.00 (1)

11100 Excision, malignant lesion $ 70.00
(billed as 11622)

88305 Histopathology (x3) $ 85.00
Multispocimen
(billed as 88304 x3)

99070 Sterile tray $ 45.00
(OK as billed)

(1) Lesion(s) on biopsy was/were a "carcinoma in situ". This is an actinic keratosis which is benign and would not generally require surgery, in my opinion.

(2) The photos provided show one linear excision and simple closure covering the entire area described in the operative report. This is one excision which justifies one code.

In my opinion, an IME by a board certified dermatopathologist appears indicated in this case in order to obtain a second opinion/evaluation of the necessity of care and future treatment in this case.

The physician providing this review is certified by the National Board of Medical Examiners and is a Diplomate, American Board of Dermatology and Pathology. He has conducted a number of research studies and is an Associate Professor of Medicine at a college of medicine. He is a Fellow of the American Academy of Dermatology and is a member of the American Medical Association, his Local and State Medical Associations, and the American Federation for Clinical Research. He has been in practice for approximately ten years.

This review is subject to the conditions set forth in the accompanying disclaimer.

/en

IV EXHIBIT #3

GULF SOUTH'S EXHIBIT A
CLAIMS DENIED WITHOUT EXPLANATION
OR CLAIM LACK OF DOCUMENTATION

DATE OF SERVICE	DOCTOR 'S DIAGNOSIS	CPT CODE	INITIAL REVIEW	SECOND REVIEW	AETNA PAID
8-24-88	Basal Cell Epithelioma	14041	OK $875	Not Considered	-0- NO EOB
8-24-88	Basal Cell Epithelioma	11642	OK $400 Considered	Not	-0- NO EOB
8-24-88	Basal Cell Epithelioma	11642	OK $200 Considered	Not	-0- NO EOB
8-31-88	Basal Cell Epithelioma	14061	OK $1,025 Done	No Graft-0-	
9-07-88	Squamous Cell carcinoma In Situ	14300	N/A	Not documented as done	-0-
9-07-88	Basal Cell Epithelioma as done	14041	N/A	Not documented	-0-

DATE OF SERVICE	DOCTOR'S DIAGNOSIS	CPT CODE	INITIAL REVIEW	SECOND REVIEW	AETNA PAID
9-12-88	Basal Cell Epithelioma as done	14300	N/A	Not documented	-0-
9-12-88	Basal Call Epithelioma	14041	N/A	Not documented as done	-0-
9-26-88	Squamous Cell Carcinoma Level II	14300	N/A	Not documented as done	-0-
10-05-88	Basal Cell Epithelioma, Squamous Cell Carcinoma In Situ, Mixed, Multifocal lesion	14300	N/A	Not documented as done	-0-
10-05-88	Basal Cell Epithelioma, Squamous Cell Carcinoma, mixed, multifocal	14061	N/A	Not documented as done	-0-

DATE OF SERVICE	DOCTOR'S DIAGNOSIS	CPT CODE	INITIAL REVIEW	SECOND REVIEW	AETNA PAID
10-31-88	Hyperkeratosis w/Squamous Cell Carcinoma In Situ	14300	N/A	Not documented as done	-0-
	0189X				

IV
EXHIBIT 4

OCHSNER CLINIC
1514 JEFFERSON HIGHWAY
NEW ORLEANS, LA 70121
CABLE ADDRESS: OCHSCLINIC
(504) 838-3940

July 17, 1989

Wayne Oakland Medical Center
3270 West Big Beaver Road
Suite 120
Troy, MI 48084

RE: Edwin Delaney
Ochsner Clinic #1023298

Dear Sirs:

I examined Mr. Edward Delaney at the request of the Aetna Life and Casualty Company on July 17, 1989. He presented himself for examination with an extensive list of papers, indicating prior treatment for actinic keratoses and squamous cell carcinomas. Many of the lesions that were treated, both by excision or other methods were suspected to be squamous cell carcinomas and proved to be, according to these records.

At the time of his examination, Mr. Delaney still had actinic keratoses that were present on the forearms, nose, and right ear. My normal treatment approach to such a patient would be to treat these cryosurgically, that is, to freeze them. It would appear the physicians who have managing his care have preferred to excise each lesion. This individual has clearly had multiple surgical procedures performed, as there are multiple scars about the face and arms at the sites of these prior removals. He has also had dermabrasion over some of the scar areas.

There was a note on the last page of the information provided that indicated a prior examination of these records was questioned by a board certified dermatologist. He had indicated that a review by a dermatopathologist might be worth-

while. Since the pathology reports are not part of the records sent to me, it may be that your company has already embarked upon this, but an independent review of the slides by a dermatopathologist might be another way of determining that the lesions excised were what they are represented to be. Some of the more recent reports or suspected squamous cell carcinoma did, in fact, turn out to be actinic keratoses as is present on the examination today.

If there are other specific questions related to the evaluation of this patient that I need to address, please let me know.

Sincerely,

Signed By
Robert L. Rietschel, M.D.
Chairman, Dept. of Dermatology
fs

WAYNE OAKLAND MEDICAL CENTERS, INC.

ADMINISTRATIVE OFFICES
SHEFFIELD OFFICE PARK
SUITE 120
3720 WEST BIG BEAVER ROAD
TROY, MICHIGAN 48064-2901

July 31, 1989

Aetna
P.O. Box 2520
Tyler, Texas 75703

Att: Eileen Kingren

RE: DELANEY, Edward
SS# 435 30 3201
Exam Date: 7-17-89

Dear Ms. Kingren:

ADDENDUM: Via telephone 7-31-89 per Doctor Rietschel.

To answer your question as to whether skin grafts were done on Mr. Delaney, my answer to that question is yes.

Sincerely,

Not Signed By
Robert L. Rietschel, M.D.
Chairman, Dept. of Dermatology

94-1970

NO. ____

APR 12 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October, 1994 Term

GULF SOUTH MEDICAL AND SURGICAL INSTITUTE, BURKS-FARBER CLINICS AND GEORGE M. FARBER, M.D.,
Petitioners,

v.

AETNA LIFE INSURANCE COMPANY, LAFARGE CORPORATION, AND MEDICAL REVIEW INSTITUTE OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES D. MORGAN
Counsel of Record
FISHER & PHILLIPS
201 St. Charles Avenue
Suite 3710
New Orleans, Louisiana 70170
(504) 522-3303

ATTORNEYS FOR RESPONDENT, LAFARGE CORPORATION

ROBERT L. REDFEARN, JR.
SIMON, PERAGINE, SMITH & REDFEARN, L.L.P.
30th Floor - Energy Centre
1100 Poydras Street
New Orleans, LA 70163-3000
(504) 569-2030

ATTORNEYS FOR RESPONDENT, AETNA LIFE INSURANCE COMPANY

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

ARGUMENT 3

CONCLUSION 5

No. _____

IN THE

Supreme Court of the United States

October, 1994 Term

GULF SOUTH MEDICAL AND SURGICAL INSTITUTE,
BURKS-FARBER CLINICS AND GEORGE M. FARBER, M.D.,
Petitioners,

v.

AETNA LIFE INSURANCE COMPANY, LAFARGE CORPORATION, AND
MEDICAL REVIEW INSTITUTE OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The reasons that certiorari should not be granted in this matter are apparent on the face of the Petition for Writ of Certiorari (herein the

"Petition"). Lafarge Corporation and Aetna Life Insurance Company, Respondents herein,[1] will not burden the record with lengthy argument here. Instead, they would simply point out several pertinent facts.

This case does not present any dispute over an important question of federal law. To the contrary, Petitioners stipulate that the courts below applied the correct standard of review, i.e. abuse of discretion. No conflict among the Courts of Appeals is presented. Petitioners claim instead that this Court should exercise its discretion and review the matter because the courts below have somehow departed from the usual course of judicial proceedings.

Once understood, however, the arguments in the Petition are nothing more than the same factual arguments that the trial court and the Court of Appeals found unpersuasive. Summary Judgment was granted and affirmed because the uncontested material facts and the applicable legal principles called for dismissal of Petitioners' claims. The same facts and the same erroneous arguments that Petitioners advance here were presented to and rejected by the trial court and on appeal. Respondents submit that the decisions of the lower courts were correct and that the record does not support the

[1] In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, Respondents note that Lafarge Coppee, of Paris, France is the parent corporation of Respondent Lafarge Corporation. Aetna Life and Casualty Company is the parent of Respondent Aetna Life Insurance Company.

notion that they departed in any way from the accepted and usual course of judicial proceedings.

ARGUMENT

The question before the United States District Court for the Eastern District of Louisiana was whether Lafarge Corporation and Aetna Life Insurance Company abused their discretion when they denied some of Petitioners' claims for benefits under the Plan. The District Court reviewed a voluminous record and concluded that Respondents presented

> an unassailable picture of a rational and thoughtful approach to determining which claims should be paid and which ones should be denied. There is no evidence whatsoever in this record that Aetna abused its discretion in the procedure used or in denying the claims under that procedure. No alternative is offered by the other side.

Page 5, Appendix II-1 to the Petition.

Throughout its case, Petitioners have argued the same points it presents to this Court:

1. Summary judgment should have been denied because the identity of the MRI physician was not revealed; and
2. Respondents did not follow Petitioners' interpretation of the recommendation of consulting physician Dr. Robert Reitschel.

The trial court and the Fifth Circuit Court of Appeals addressed each assertion and rightly concluded that neither had merit.

As to the identity of the MRI physician, the trial court debunked this argument on page 6 of its decision. See Appendix II-1 to the Petition. The trial court analyzed the recommendations of the reviewing physician, MRI and the actions of the Plan Administrator. The trial court further found that the Petitioners offered no evidence that there was anything suspect in the way Respondents handled the claims. There was no undisputed material fact, and the court found there was no abuse of discretion by the Administrator. The Court of Appeals affirmed these findings of the trial court.

The Dr. Reitschel factor is another old argument refuted by both lower courts. Petitioners claim that the failure to follow Dr. Reitschel's recommendation "may be taken as an abuse of discretion standing alone." As they have throughout this litigation, Petitioners misstate what Dr. Reitschel said. His report simply observed that a dermatopathologist would be able to verify whether the lesions removed by Dr. Farber were what Farber claimed them to be. Despite Petitioners' assertions to the contrary, Aetna did not challenge Dr. Farber's conclusions and diagnoses. Thus, further tests to verify those conclusions and diagnoses were not necessary. The controversy

PUBLISHER'S NOTE:

The following page is unavailable for filming;

Pg. 5

Respectfully submitted,

JAMES D. MORGAN
Counsel of Record
FISHER & PHILLIPS
201 St. Charles Avenue
Suite 3710
New Orleans, Louisiana 70170
(504) 522-3303

ATTORNEYS FOR RESPONDENT,
LAFARGE CORPORATION

ROBERT L. REDFEARN, JR.
SIMON, PERAGINE,
SMITH & REDFEARN, L.L.P.
30th Floor - Energy Centre
1100 Poydras Street
New Orleans, LA 70163-3000
(504) 569-2030

ATTORNEYS FOR RESPONDENT,
AETNA LIFE INSURANCE COMPANY